No. 78-1845

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

STATE OF ILLINOIS,

Petitioner

vs.

JOHN M. VITALE,

Respondent

On Writ of Certiorari to the Supreme Court of the State of Illinois

BRIEF AND ARGUMENT FOR PETITIONER

WILLIAM J. SCOTT,
Attorney General of the State of Illinois,
DONALD B. MACKAY,
MELBOURNE A. NOEL, JR.,
Assistant Attorneys General,
188 W. Randolph Street,
Chicago, Illinois 60601,

Attorneys for Petitioner.

BERNARD CAREY,
State's Attorney, Cook County, Illinois
Room 500, Richard J. Daley Center,
Chicago, Illinois 60602,
MARCIA B. ORR,
JAMES S. VELDMAN,
Assistant State's Attorneys,

Of Counsel.

Printed by the Authority of the State of Illinois—11-79-55

INDEX

TABLE OF AUTHORITIES

STATE OF ILLINOIS PROVISIONS

No. 78-1845

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

STATE OF ILLINOIS,

Petitioner

vs.

JOHN M. VITALE,

Respondent

On Writ of Certiorari to the Supreme Court of the State of Illinois

BRIEF AND ARGUMENT FOR PETITIONER

Pursuant to this Court's order of October 1, 1979 granting the Writ of Certiorari in the instant case, your Petitioner, the State of Illinois, respectfully requests that this Honorable Court set aside the decision of the Supreme Court of Illinois which was originally rendered in this case on April 3, 1978. Pursuant to the directive of this Court, the Illinois Supreme Court has, on March 22, 1979, certified that the basis of its opinion is its interpretation of the double jeopardy provisions of Amendment V of the Constitution of the United States, as applied to the facts in the present case.

OPINIONS BELOW

The opinion of the Supreme Court of Illinois holding that a Petition for Adjudication of Wardship filed against the then minor respondent, John M. Vitale, violated Vitale's right against being twice placed in jeopardy for the same offense, was rendered by that court on April 3, 1978. It is reported as *In Re. Vitale, a Minor,* at 71 Ill.2d 229, 375 N.E.2d 87 (1978). In turn, the opinion of the Illinois Supreme court which is the basis of the present proceeding on Certiorari affirmed the result reached by the Appellate Court of Illinois, First District, although for markedly different reasons. The opinion of the Appellate Court of Illinois, First District, is reported at 44 Ill. App.3d 1030, 357 N.E.2d 1288 (1977). In conformity with Rule 23 of the Supreme Court of the United States, each of these opinions was appended in full to the Petition for Certiorari filed by the People in the instant case. The Illinois Supreme Court and Appellate Court opinions appear in the Petition for Certiorari as Appendix A and Appendix B respectively.

Following the rendition of the decision of the Illinois Supreme Court, the People of the State of Illinois sought review by this Honorable Court upon the Writ of Certiorari. On July 14, 1978, the People filed a Petition for Certiorari which was docketed in the Supreme Court of the United States as No. 78-2. On November 27, 1978, this Court entered an order granting the Writ of Certiorari, vacating the judgment of the Supreme Court of Illinois, and remanding the case to the Supreme Court of Illinois for that court to determine whether its decision was based on Federal Constitutional grounds, state grounds, or both. (A. 37) On March 22, 1979, the Illinois Supreme Court certified to this Court that its original decision in the instant case was based upon its interpretation of the double jeopardy provisions of the Fifth Amendment to the Constitution of the United States. (A. 38)

Following this certification by the court below, the People of the State of Illinois filed a second Petition for Certiorari in this Honorable Court. That Petition, filed on June 11, 1979, was docketed as No. 78-1845. On October 1, 1979, this Court granted the Writ of Certiorari and set down a schedule for briefs and arguments. (A. 39)

Pursuant to the order of October 1, 1979, the People of the State of Illinois now submit the instant brief on behalf of Petitioner.

JURISDICTION OF THE COURT

The opinion of the Illinois Supreme Court herein sought to be reviewed was rendered by this court on April 3, 1978. On March 22, 1979, pursuant to an order of the Supreme Court of the United States, the Illinois court certified that its decision was based upon Federal Constitutional grounds. (A. 38) In light of that certification it is now clear that the question presented by the present case is one of interpretation of provision of the Constitution of the United States. Furthermore, jurisdiction of this Court is invoked, as it was in the Petition for Certiorari, under 28 U.S.C. Sec. 1257(3), since in the proceedings in the Illinois courts below the Respondent had set out and maintained an allegation of violation of his rights under the United States Constitution.

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offense to be twice placed in jeopardy of life or limb; nor shall be compelled in any

criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation".

QUESTIONS PRESENTED

1. Whether the Respondent, who struck and killed two small children while driving his automobile through an intersection at an excessive rate of speed and in complete disregard of the signal of a school crossing guard, may be properly made the subject of wardship proceedings charging him with involuntary manslaughter, notwithstanding the fact that he was charged with and fined for the traffic offense of failing to reduce speed to avoid an accident, which charge arose out of the same incident.

2. Whether the offenses of failing to reduce speed of an automobile and involuntary manslaughter, as defined by the legislature of the State of Illinois, are separate offenses for the purpose of the concept of double jeopardy:

3. Whether the traffic offense could possibly be said to be a lesser included offense of involuntary manslaughter in view of the fact that the so-called lesser offense is not, by necessity, contained within the so-called greater offense.

STATEMENT OF THE CASE

On November 20, 1974, an automobile driven by John M. Vitale, then a minor, struck two small children, Carrilynn Christakos and George Kech. (A. 4) One of the children, George Kech, died almost immediately after being struck. (A. 23) The other child, Carrilynn Christakos, died on the following day at Ingalls Memorial Hospital. (A. 25) The children were five years old at the time of their deaths.

A report summarizing police investigation of the incident appears of record and was made use of in the factual statements made by the Supreme Court of Illinois below. (A. 21-A. 26)

According to the investigation of police at the scene, the two children were struck in a marked crosswalk as they were being assisted across the street by a uniformed school crossing guard who was displaying a hand-held stop sign. (A. 23) Police investigation revealed the presence of skid marks at the scene indicating that at the time of the collision the vehicle being driven by Vitale was traveling at a speed of fifty miles per hour. (A. 23-A. 24) At the time there was in effect a twenty mile per hour school speed limit. (A. 25) The area, at times when school was not in session, was posted with a speed limit of thirty five miles per hour. There were some seven signs warning of the school zone and the twenty mile per hour school speed limit posted along the route which John Vitale drove in reaching the intersection at which the two children were struck and killed. (A. 25) The police were also able to determine that three out of the four breaks on the automobile which Vitale was driving were faulty. (A. 24) The Respondent told a police officer at the scene that while driving his attention was diverted to his left and that, when he looked back in the direction in which he was driving, it was already too late for him to avoid running down the two children. (A. 23) The officer on the scene issued a traffic citation charging John Vitale with failure to reduce speed to avoid an accident. Ill.Rev.Stat., Ch. 95½, Sec. 11-601. (A. 5) On December 23, 1974, the traffic case was heard in the Circuit Court of Cook County at South Holland, Illinois. (A. 6) Vitale entered a plea of not guilty to the traffic charge, he was tried, found guilty, and fined in the sum of fifteen dollars ($15.00).

On the following day, December 24, 1974, the Respondent was charged with involuntary manslaughter in connection with the deaths of the two children. (A. 4) Because he was a minor at the time, the charges took the form of a Petition for Adjudication of Wardship, a proceeding in Juvenile Court to determine Vitale's delinquency. (A. 2-A. 4) Vitale filed a motion to dismiss the wardship petition alleging, *inter alia,* that

by virtue of having been convicted and fined on the charge of failing to reduce speed to avoid an accident his constitutional right against being twice placed in jeopardy for the same offense was violated by the involuntary manslaughter charges contained in the petition. (A. 5-A. 7) The judge in Juvenile Court dismissed the wardship petition pursuant to Vitale's motion. (A. 27-A. 30) From this determination, the People appealed under authority of Rule 604 of the Supreme Court of Illinois. Ill. Rev. Stat., Ch. 110A, Sec. 604(a). (A. 31-A. 32) The Appellate Court of Illinois, First District determined that the judge correctly dismissed the petition since, they decided it had violated certain provisions of the Illinois Criminal Code dealing with joinder of causes in action. *In Re. Vitale,* 44 Ill.App.3d 1030, 357 N.E.2d 1288 (1977).

The People sought and obtained Leave to Appeal to the Supreme Court of Illinois from the determination of the Appellate Court. With Justices Underwood and Ryan strongly dissenting the Illinois Supreme Court held on April 3, 1978, that the Petition for Adjudication of Wardship was properly dismissed for the reason that it violated Vitale's right under the Fifth Amendment to the United States Constitution against being twice placed in jeopardy for the same offense. The court's majority held that in view of the fact that Vitale had been fined for the traffic offense of failing to reduce speed to avoid an accident, he could not be charged with involuntary manslaughter in the deaths of the two young children. The dissenting opinion pointed out that these two offenses were not the same in law or in fact, that under Illinois law the traffic charge was not a lesser included offense of the charge of involuntary manslaughter, and that there was herein no violation of the double jeopardy provisions of the Fifth Amendment to the United States Constitution. (See, Petition for Certiorari pp. A. 9 through A. 22.)

Seeking to overturn the determination of the majority of justices of the Supreme Court of Illinois, the People sought from this Honorable Court review on the Writ of Certiorari. In case No. 78-2, *State of Illinois* v. *Vitale,* this court granted Certiorari. On November 27, 1978, the majority of justices of this Court vacated the judgment of the Supreme Court of Illinois and remanded the cause to that court for determination of whether its decision was based upon a Federal Constitutional question. (A. 37)

Upon remand to the Supreme Court of Illinois, that court certified, on March 22, 1979, that its decision in the instant case was founded squarely upon its interpretation of the double jeopardy prohibition contained in Amendment V of the Constitution of the United States. (A. 38)

Pursuant to this certification, the People of the State of Illinois filed a second Petition for Certiorari in this Court, docketed as No. 78-1845 on June 11, 1979. On October 1, 1979, this Court granted the Writ and ordered the parties to file briefs. (A. 39) The present brief is now filed pursuant to this order.

SUMMARY OF ARGUMENT

The position of the State of Illinois in the instant case is that no violation of Respondent's rights under the Fifth Amendment of the United States Constitution occurred in his being charged with involuntary manslaughter in the deaths of young Carrilynn Christakos and George Kech, notwithstanding the fact that a fine has previously been imposed upon him for the traffic offense of failing to reduce the speed of his vehicle to avoid an accident. The arguments set forth in support of this position may be briefly summarized in the following manner.

1. **Lack Of Identity Of Offenses For Double Jeopardy Purposes.**

The concept of double jeopardy embodied within Amendment V of the United States Constitution is a protection against

being twice tried or punished for the *same offense.* The appropriate test is whether each offense which may arise from a single act involves an element of proof which the other does not. *Blockburger* v. *United States,* 284 U.S. 299 (1934). When under this classic test the two offenses charged are not the same offense, there is no violation of the prohibition against an improper second jeopardy.

In the present case, involuntary manslaughter and failing to reduce the speed of an automobile to avoid an accident are not the same offense as contemplated by the Fifth Amendment. On the contrary, the first does not necessarily involve an automobile at all, while the second does not necessarily involve death, or for that matter even a collision. The traffic offense, after all, is failing to reduce speed to avoid an accident. This does not entail striking any person or property. On the other hand, involuntary manslaughter involves no necessity of use of an automobile. Each offense is a separate and distinct offense. Therefore, they are not the *same offense* for double jeopardy purposes. The majority of the Supreme Court of Illinois was incorrect in holding to the contrary, as will be more amply shown in the full arguments to follow.

2. **Lack of Identity Of Traffic Offense As Lesser Included Offense Of Involuntary Manslaughter.**

While it may be true that a lesser included offense is the same offense as the greater offense, *Brown* v. *Ohio,* 432 U.S. 161 (1977), it is not correct, as held by the majority of the Supreme Court of Illinois below that failure to reduce speed to avoid an accident is a lesser included offense of involuntary manslaughter. In order to be a lesser included offense, it must always be true that the so-called lesser offense is included by definition in the so-called greater. *Virgin Islands* v. *Acquino,* 378 F. 2d 540 (3rd Cir., 1967), and decisions of this Court cited in the principle argument. Clearly the elements which must be proven under the respective Illinois statutes herein involved are not such that the offense of involuntary manslaughter will always

include the commission of the offense of failing to reduce speed to avoid an accident. Involuntary manslaughter may take many forms having nothing to do with speed, or even with the driving of an automobile; while failure to reduce speed need involve neither death nor even collision with any person.

Therefore, the Illinois Supreme Court incorrectly found that failing to reduce speed to avoid an accident was a lesser included offense of involuntary manslaughter. Thus, the determination of that court that double jeopardy was violated is completely unfounded.

ARGUMENT

THE PETITION CHARGING JOHN VITALE WITH INVOLUNTARY MANSLAUGHTER IN THE DEATHS OF TWO SMALL CHILDREN WAS PROPERLY FILED NOTWITHSTANDING A PRIOR FINE IMPOSED ON HIM FOR THE TRAFFIC OFFENSE OF FAILING TO REDUCE SPEED, AND DID NOT VIOLATE VITALE'S RIGHT TO BE FREE FROM AN IMPROPER SECOND JEOPARDY FOR THE SAME OFFENSE.

I.

THE TWO OFFENSES HERE WERE NOT THE SAME OFFENSE FOR PURPOSES OF DOUBLE JEOPARDY BUT, ON THE CONTRARY, WERE SEPARATE OFFENSES ARISING FROM A SINGLE ACT; THEREFORE, THERE WAS NO VIOLATION OF RESPONDENT'S RIGHTS UNDER THE FIFTH AMENDMENT WHEN, FOLLOWING IMPOSITION OF THE TRAFFIC FINE, HE WAS CHARGED WITH INVOLUNTARY MANSLAUGHTER.

As we have indicated above, John Vitale drove his automobile at a high rate of speed into an intersection guarded by a school crossing guard. In disregard of the guard's signal, and while operating an automobile on which three out of four breaks were faulty, Vitale struck and killed two young children who were attempting to cross under the guard's direction. Vitale was charged with failing to reduce speed to avoid an accident and was convicted and fined on that traffic charge. Subsequently, he was charged with involuntary manslaughter in the deaths of the children. These charges were dismissed, and the People appealed. The majority of the Supreme Court of Illinois held that the petition charging Vitale with involuntary manslaughter violated the prohibition against placing a person

in jeopardy more than once for the same offense. That court determined that the two offenses, failing to reduce speed to avoid an accident and involuntary manslaughter, were the same offense for double jeopardy purposes. Their opinion also found that the traffic offense was a lesser included offense of involuntary manslaughter and, thus, the two were the same offense. In each of these determinations the majority of the Illinois Supreme Court was incorrect.

In his dissenting opinion in the Supreme Court of Illinois, Mr. Justice Underwood, with whom Mr. Justice Ryan joined, stated (Petition for Certiorari, P. A. 8):

> "I have inflicted this lengthy dissent upon the reader because I believe the majority of this court has substantially broadened the double jeopardy rule it purports to follow, reaching a result which is compelled by neither the Federal Constitution nor the constitution or statutes of Illinois."

Mr. Justice Underwood then went on to analyse the problem finding (1) that the traffic offense and the offense of involuntary manslaughter are not the same offense for purposes of double jeopardy, and (2) that the traffic offense is not a lesser included offense of involuntary manslaughter. We submit that in so determining Justice Underwood was correct. In fact, the prohibition against double jeopardy was in no sense violated in the present case.

That under our system of justice one may not be twice placed in jeopardy for the same offense is abundantly clear. Constitution of the United States, Amendment V; Constitution of the State of Illinois, Article 1, Sec. 10; *United States* v. *Jorn*, 400 U.S. 470 (1971). The statutes of the State of Illinois further implement this policy in that they provide that a second prosecution for the same offense will not lie (Ill. Rev. Stat., 1977, Ch. 38, Sec. 3-4), and that when offenses can and should be tried together they may not be separately tried unless demands of due process and fairness require that the trial court

sever them. Ill. Rev. Stat., 1977, Ch. 38, Sec. 3-3.[1] The underlying purpose of the double jeopardy prohibition is to prevent the prosecution from making repeated attempts to convict the accused for the same offense and to eliminate the accompanying risk that, though he might be innocent, defendant might eventually be convicted. *Green* v. *United States,* 355 U.S. 184 (1955). What is sought to be prevented is multiple prosecution and/or punishment for the *same offense. United States* v. *Dinitz,* 424 U.S. 600 (1976); *United States* v. *Wilson,* 420 U.S. 332 (1975); *North Carolina* v. *Pierce,* 395 U.S. 711 (1968). What is sought to be prevented by the double jeopardy concept can be seen by the factual situation in cases such as *People* v. *Stickler,* 31 Ill. App. 3d 977, 334 N.E. 2d 475 (4th Dist., 1975). There the court found it a violation of double jeopardy concepts for the defendant, who had earlier plead guilty to and been convicted of the theft of certain rings, to be again prosecuted for the theft of those same rings along with certain saddles taken by him at the same time and as part of the same offense.

However, the double jeopardy concept concerns itself with the identity of the offenses and not with the identity of the act or series of acts out of which they arise. *Blockburger* v. *United States,* 284 U.S. 299 (1934); *Ciucci* v. *Illinois,* 355 U.S. 571

[1] It should be noted here in passing that in so far as these Illinois statutes deal with the state concept of compulsary joinder, they are not before us for consideration. While the aspect of compulsary joinder under Illinois statutes was mentioned in the trial court, and formed the principle basis for the opinion of the Appellate Court, First District, the Supreme Court of Illinois has specifically certified that its opinion rests not upon this concept but upon the Fifth Amendment prohibition against double jeopardy. Our inquiry here is thus limited to the Federal Constitutional question. Furthermore, since the Illinois Supreme Court has certified the basis of its opinion to be the Federal question, it has not finally determined the applicability of state compulsary joinder to this case. This being so, the question of interpretation of those state statutory concepts is not before this Court in the instant case. *Garner* v. *Louisiana,* 386 U.S. 157 (1961).

(1958). The same rule has in the past been followed many times by the Supreme Court of Illinois. *People* v. *Joyner,* 50 Ill.2d 302, 278 N.E.2d 756 (1972); *People* v. *Hairston,* 46 Ill.2d 348, 263 N.E.2d 840 (1970), *Cert. denied,* 402 U.S. 972 (1971). When a single act encompasses more than one offense, there is no prohibition against separate trials, convictions or punishment as to each of the separate and distinct offenses. *Gavieres* v. *United States,* 220 U.S. 338 (1911). In fact, it has been said that in order that two offenses arising out of the same act may not be separately prosecuted under the concept of double jeopardy, it is necessary that the two offenses be in law and in fact the same offense. *United States* v. *Linetski,* 533 F.2d 592 (5th Cir., 1976). See also, *People* v. *Allen,* 368 Ill. 368, 14 N.E.2d 397 (1938), *Cert. denied,* 308 U.S. 511 (1939). The test is not whether a single act or series of acts is involved. The test is that which has become commonly known as the "same evidence" test. That is, the appropriate test is whether each of the charges arising out of the same act or series of acts involves an element of proof which the other does not. *Brown* v. *Ohio,* 432 U.S. 161 (1977); *Jeffers* v. *United States,* 432 U.S. 137 (1977); *Blockburger* v. *United States, supra.; United States* v. *Smith,* 574 F.2d 308 (5th Cir., 1978). As this Court stated in *Ianneilli* v. *United States,* 420 U.S. 770 (1975), when each charged offense requires proof different from the other, there is no violation of the right to be free from double jeopardy although there may be a substantial overlap in the elements which must be proven to constitute each of the charged offenses. See also, *Weller* v. *Florida,* 397 U.S. 387 (1970). As Mr. Chief Justice Burger phrased it in his dissenting opinion in *Ashe* v. *Swenson,* 397 U.S. 436, 463 (1969), "The concept of double jeopardy and our firm constitutional commitment is against repeated trials for *the same offense.* This Court, like most American jurisdictions, has expanded that part of the Constitution into a 'same evidence' test". (Emphasis the Court's.)

When a single act constitutes more than one offense, and those offenses are not the same offense under the *Blockburger* criteria, double jeopardy does not prohibit separate convictions and separate sentences for each of the offenses involved. *United States* v. *Wheeler,* 435 U.S. 313 (1978). Put another way, multiple convictions arising out of the same act are perfectly proper as long as each offense involves an element of proof which the other does not. *Pereira* v. *United States,* 347 U.S. 1 (1954). So, in *Kowalski* v. *Parratt,* 533 F.2d 1071 (8th Cir., 1976), *Cert. denied,* 429 U.S. 824 (1976), the defendant was charged in the State of Nebraska under Nebraska law with robbery in that he took property from the victim by force or by putting the victim into a state of fear. He was separately charged under Nebraska law with the offense of use of a firearm during the course of a felony. In fact, the means used to put the victim in a state of fear in the robbery was the use of the gun which served as the basis of the charge of using a firearm in the commission of a felony. Considering the *Blockburger* test, that is, whether the offenses are the same or whether each requires proof which the other does not, the court determined that the two Nebraska charges were not the same offense because the proof required by statute to establish one was not the same as the proof required by statute to establish the other. Proof of the robbery did not necessarily involve the use of a firearm, nor did the elements of robbery enter of necessity into the statutory definition of use of a firearm during the course of a felony. The test is what elements of proof are required under the applicable statute, not the particular proofs in a particular case. *Virgin Islands* v. *Smith,* 358 F.2d 691 (3rd Cir., 1977). The fact that in a particular case the proofs might be virtually the same is not a relevant consideration. This was the precise point made by Mr. Justice Underwood in his dissenting opinion below when he stated: "The crucial evidence is not that actually presented, but the evidence required by the applicable statutes". (Petition for Certiorari, P.A. 12.) See, *Gavieres* v. *United States, supra.*

Clearly here, as we shall see in examining the definitions of the two offenses under Illinois law under the following point, the required proofs were not the same. Thus, there was nothing to be found in the provisions of the Fifth Amendment which would have prevented the charges of involuntary manslaughter lodged against John Vitale from having been prosecuted to a proper conclusion.

II.

THE TRAFFIC OFFENSE CHARGED AGAINST JOHN VITALE WAS NOT A LESSER INCLUDED OFFENSE OF INVOLUNTARY MANSLAUGHTER UNDER ILLINOIS LAW, THEREFORE THERE WAS NOT THE REQUISITE IDENTITY OF OFFENSES TO MAKE THEM THE SAME OFFENSE FOR DOUBLE JEOPARDY PURPOSES.

In its opinion below, the majority of the Illinois Supreme Court held that John Vitale was twice placed in jeopardy for the same offense because the traffic charge of failing to reduce speed to avoid an accident is a lesser included offense of the charge of involuntary manslaughter. This result, as stated in the dissenting opinion of Justices Underwood and Ryan, is simply not correct. It is true that conviction of a greater offense will preclude subsequent conviction of any of its lesser included offenses, and that conviction of any of those lesser offenses precludes subsequent conviction of the greater offense. *Harris* v. *Oklahoma,* 433 U.S. 682 (1977); *Brown* v. *Ohio,* 432 U.S. 161 (1977). In *Brown, supra.,* the offense of joyriding was found under Ohio law to constitute a lesser included offense of theft of an automobile; therefore, defendant could not be tried and/or convicted of both those offenses. In *Brown,* this Court specified the issue in the case as; "Whether the double jeopardy clause of the Fifth Amendment bars prosecution and punishment for the

crime of stealing an automobile following a prosecution and punishment for the lesser included offense of operating the same vehicle without the owner's consent". (432 U.S. at 162.) The fact that in *Brown* we were dealing with an instance involving greater and lesser included offenses was taken as settled by this Court in its determination of that case. But in order to have the situation of a lesser included offense, it is necessary that proof of the greater offense will always, of necessity, include proof of the lesser. *Brown* v. *Ohio, supra., Virgin Islands* v. *Acquino,* 278 F. 2d 540 (3rd Cir., 1967). Put another way, the lesser offense requires no proof which is not necessary in order to prove the greater, and the greater offense includes among its necessitated proofs all of the elements of the lesser included offense. Thus, as determined by this Court in the *Brown* decision, the lesser included offense is the same offense as the greater for purposes of the concept of double jeopardy.

In the present case, the fact that the traffic offense of failure to reduce speed to avoid an accident is not a lesser included offense of the felony charge of involuntary manslaughter may be clearly seen from the two Illinois statutes involved. Involuntary Manslaughter is defined by statute in Illinois as follows (Ill. Rev. Stat. 1973, Ch. 38, Sec. 9-3):

> "(a) A person who kills an individual without lawful justification commits involuntary manslaughter if his acts whether lawful or unlawful which cause the death are such as are likely to cause death or great bodily harm to some individual, and he performs them recklessly.
> "(b) If the acts which cause death consist of the driving of a motor vehicle, the person may be prosecuted for reckless homicide or if he is prosecuted for involuntary manslaughter, he may be found guilty of the included offense of reckless homicide".

Thus, the Illinois State Legislature has specifically made reckless homicide a lesser included offense of the crime of involuntary manslaughter. It seems clear from this that the

Illinois law makers intended this lesser offense to be available as an alternative for conviction in a case involving the death of some person due to the driving of an automobile by the accused charged with involuntary manslaughter. Although taking the time to specify reckless homicide as an included offense of involuntary manslaughter when the death results from the driving of a motor vehicle, the Illinois law makers made no similar provision concerning the traffic offense of failing to reduce speed to avoid an accident. The reason for this is that clearly that traffic offense is in no sense a lesser included offense of involuntary manslaughter.

The traffic charge is defined under Illinois law as follows (Ill.Rev.Stat., 1973, Ch. 95½, Sec. 11.601(a):

> "No vehicle may be driven upon any highway of this State at a speed which is greater than is reasonable and proper with regard to traffic conditions or the use of the highway, or endangers the safety of any person or property. The fact that the speed of a vehicle does not exceed the applicable maximum speed limit does not relieve the driver from the duty to decrease speed when approaching and crossing an intersection, when approaching and going around a curve, when approaching a hill crest, when traveling upon any narrow or winding highway, or when special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions. Speed must be decreased as may be necessary to avoid colliding with any person or vehicle on or entering the highway, in compliance with legal requirements and the duty of all persons to use due care."

Speaking for himself and for Mr. Justice Ryan in his dissenting opinion in the Illinois Supreme Court below, Mr. Justice Underwood after analysing these provisions concluded (Petition for Certiorari. P. A10):

> ". . . Clearly, proof that one failed to reduce the speed of his vehicle to avoid a collision (the traffic offense) does not prove manslaughter, for the traffic offense need not involve death; equally clear is the fact that commission of the crime

of involuntary manslaughter (the wardship charge) need not involve an unlawful failure to reduce speed or even the use of a car."

The fact that in this particular instance death of the children resulted, among other factors, from Vitale's failure to reduce the excessive speed of his vehicle, is not relevent. Under the "same evidence" test the criterion is not that which was proven in the particular case, but rather that which must be proven to meet the requirements of the several statutory provisions involved. If the so-called greater offense can be proven without of necessity including the lesser, or if the lesser includes an element not necessarily to be found in the so-called greater, then they are not of necessity included offenses and are not the same offense for purposes of the protection offered by the Fifth Amendment. *Brown* v. *Ohio,* 432 U.S. 161 (1977); *Virgin Islands* v. *Smith,* 558 F.2d 691 (3rd Cir., 1977); *Kowalski* v. *Parratt,* 533 F.2d 1071 (8th Cir., 1976), *Cert. denied,* 429 U.S. 844 (1976); *People* v. *Hairston,* 46 Ill.2d 348, 263 N.E.2d 840 (1970), *Cert. denied,* 402 U.S. 972 (1971). It is obvious here that failure to reduce speed need involve no death nor even collision with a pedestrian, while involuntary manslaughter need involve no use of an automobile or element of speed at all. The offense of involuntary manslaughter must, by definition, involve the death of some person, an element completely lacking from the definition of the traffic offense of failure to reduce speed to avoid an accident. Thus, under no circumstances can it be said that these two offenses are necessarily included one within the other. They are not included offenses. They are not, therefore, the same offense for purposes of double jeopardy.

The Supreme Court of the State of Ohio in a case not unlike that now before us held that a conviction for homicide by vehicle did not preclude conviction on a traffic charge of driving at a speed greater than will allow the driver to be able to stop within an assured clear distance. *State* v. *Best,* 42 Ohio. St. 2d 530, 536, 330 N.E. 2d 421 (1975):

> "The only common element to the two offenses is that both involve the operation of a motor vehicle. No element of speed or distance ahead is involved in the offense of homicide by vehicle, and no element of causing death . . . is involved in the offense of failing to keep an assured clear distance. Although both offenses arose out of the same transaction, they are separate and distinct offenses."

Here also, the statutory elements of the two offenses are different and it is this which makes them separate and distinct offenses for double jeopardy purposes. *Virgin Islands* v. *Smith,* 558 F.2d 691 (3rd Cir., 1977); *United States* v. *Cumberbatch,* 563 F.2d 49 (2nd Cir., 1977). There is, as we have noted, no constitutional prohibition either in Federal or Illinois law against multiple prosecutions when an act or series of acts results in separate and distinct violations of the law. *United States* v. *Crew,* 538 F.2d 575 (4th Cir., 1975), *Cert. denied,* 429 U.S. 852 (1976), *People* v. *King,* 66 Ill.2d 551, 362 N.E.2d 352 (1977).

We submit, therefore, that it is clear that the traffic offense of which John Vitale was found guilty was not a lesser included offense of involuntary manslaughter, nor are the two offenses the same offense in law and in fact. They are not the same offense for purposes of double jeopardy. Therefore, the opinion of the majority of the Suppeme Court of Illinois was incorrect and should not be allowed to stand as the law in the State of Illinois. On the contrary, this Honorable Court should set aside the determination of the Illinois Supreme Court below and thus set right the concept of double jeopardy as applied to cases such as the one now before us.

CONCLUSION

For the reasons set forth above, the People of the State of Illinois respectfully request that this Honorable Court reverse the judgment of the Supreme Court of Illinois herein reviewed and remand the case to that court with directions to return it to the Circuit Court of Cook County for further, proper proceedings on the charges of involuntary manslaughter.

Respectfully submitted,

WILLIAM J. SCOTT,
Attorney General of the State of Illinois,

DONALD B. MACKAY,
MELBOURNE A. NOEL, JR.,
Assistant Attorneys General,
188 W. Randolph Street,
Chicago, Illinois 60601,

Attorneys for Petitioner.

BERNARD CAREY,
State's Attorney, Cook County, Illinois
Room 500, Richard J. Daley Center,
Chicago, Illinois 60602,

MARCIA B. ORR,
JAMES S. VELDMAN,
Assistant State's Attorneys,

Of Counsel.